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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 JILL BLOOMBERG,

4 Plaintiff,

New York, N.Y.

5 v.

17 Civ. 3136 (PGG)

6 THE NEW YORK CITY DEPARTMENT  
7 OF EDUCATION AND CARMEN  
FARINA,

8 Defendants.  
9 -----x

10 May 3, 2017  
11 5:20 p.m.

12 Before:

13 HON. PAUL G. GARDEPHE,

14 District Judge

15 APPEARANCES  
16

17 MIRER MAZZOCCHI SCHALET JULIEN & CHICKEDANTZ, PLLC  
18 Attorneys for Plaintiff  
19 BY: JEANNE I. MIRER  
MARIA L. CHICKEDANTZ

20  
21 ZACHARY W. CARTER  
Corporation Counsel of the City of New York  
22 BY: ANDREA M. O'CONNOR  
WILLIAM A. GREY  
23 Assistant Corporation Counsel  
24  
25

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1 (Case called)

2 MS. MIRER: Jeanne Mirer, Mirer Mazzocchi Schalet  
3 Julien & Chickedantz, for the plaintiff.

4 MS. O'CONNOR: Andrea O'Connor for the Department of  
5 Education and Chancellor Farina.

6 THE COURT: I have read the papers. I am happy to  
7 hear any additional argument the parties want to make.

8 Ms. Mirer, anything else you want to say?

9 MS. MIRER: Nothing, your Honor, except just in terms  
10 of the adverse action standard, we clearly believe that it is a  
11 test that, whether or not the OSI investigation would dissuade  
12 a reasonable worker from participating in protected activity.

13 Thank you.

14 THE COURT: All right. Does the city want to offer  
15 any additional argument?

16 MS. O'CONNOR: No, your Honor.

17 THE COURT: This is a continuation of a hearing on  
18 plaintiff's application for a temporary restraining order and  
19 preliminary injunction.

20 Plaintiff Jill Bloomberg is the principal of Park  
21 Slope Collegiate, which I will be referring to as "PSC," which  
22 is a high school located at the John Jay Educational Complex,  
23 which I will be referring to as "John Jay," located in the Park  
24 Slope section of Brooklyn. (Cmplt. (Dkt. No. 1) ¶¶ 4, 10-11,  
25 22) Plaintiff has worked for the New York City Department of

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1 Education, or "DOE," since 1998, and she has served as PSC's  
2 principal for the past 13 years. (*Id.* ¶¶ 10-11)

3 PSC is one of four secondary schools co-located at  
4 John Jay. The other schools co-located at John Jay are the  
5 Secondary School for Journalism, which I will refer to as  
6 "Journalism," the John Jay School for Law, which I will refer  
7 to as "Law," and Millennium Brooklyn High School. (*Id.* ¶¶ 4,  
8 55; Bloomberg Aff. Exhibit 3 (Dkt. No. 10-3)) PSC's student  
9 body is 85 percent black and Latino. Journalism's student body  
10 is 87 percent black and Latino, and Law is 90.4 percent black  
11 and Latino. (*Id.* at ¶¶ 28, 30, 55) Millennium Brooklyn --  
12 which is an offshoot of Millennium High School in Manhattan, a  
13 school with a predominantly white student body -- joined the  
14 John Jay complex in 2011. (*Id.* at ¶ 32) According to the  
15 complaint, Millennium Brooklyn maintains a "high percentage" of  
16 white students. The student body at Millennium Brooklyn is  
17 nonetheless majority black and Latino. (*Id.* ¶ 55)

18 In the complaint, plaintiff asserts that -- throughout  
19 her nearly 20-year career at DOE -- she has been an "outspoken  
20 advocate against [race discrimination] and segregation within  
21 the DOE." (*Id.* ¶ 37). The complaint sets forth a number of  
22 instances -- dating back to 2011 -- in which plaintiff has  
23 publicly addressed these issues and advocated for greater  
24 equality within the DOE. (See *Id.* ¶¶ 32-54) This lawsuit  
25 relates not to plaintiff's alleged long record of opposing

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1 segregation in DOE schools, however, but instead to a January  
2 10, 2017 e-mail that plaintiff sent to two DOE officials on  
3 January 10, 2017, complaining about the alleged "segregated and  
4 unequal allocation of sports teams and resources" at John Jay.  
5 (*Id.* at ¶ 26)

6 Plaintiff sent her January 10, 2017 e-mail to Eric  
7 Goldstein, who is the head of DOE's Office of School Support  
8 Services, which is responsible for the Public School Athletic  
9 League, or "PSAL." The other addressee was DOE superintendent  
10 Michael Prayor, who is plaintiff's direct supervisor. (*Id.* ¶  
11 55; Bloomberg Aff. Ex. 3 (Dkt. No. 10-3); Supp. Bloomberg Aff.  
12 (Dkt. No. 21) ¶ 7) In her e-mail, plaintiff asserts that the  
13 DOE is operating "separate and unequal [sports] programs" at  
14 John Jay. (Bloomberg Aff., Ex. 3 (Dkt. No. 10-3))

15 DOE offers two sports programs at John Jay. The  
16 first -- the John Jay Campus PSAL -- is offered to students at  
17 PSC, at Journalism, at Law, and at the nearby Brooklyn High  
18 School of the Arts, which is also predominantly black and  
19 Latino. (*Id.*) The second sports program at John Jay is the  
20 Millennium High School PSAL. This program is offered to  
21 students at Millennium Brooklyn and Millennium High School in  
22 Manhattan. (*Id.*) Because Millennium Manhattan does not have a  
23 gym, its students participate in sports programs with  
24 Millennium Brooklyn at the John Jay campus. (*Id.*) The student  
25 body at Millennium Manhattan is about 75 percent white and

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1 about 25 percent black and Latino. (*Id.*)

2 Because plaintiff's January 10, 2017 e-mail is  
3 critical to this lawsuit -- plaintiff alleges that it provoked  
4 DOE to launch a retaliatory investigation against her -- I am  
5 going to read that e-mail in its entirety.

6 The sender of the e-mail is Jill Bloomberg. It is  
7 dated January 10, 2017, at 6:49 a.m. It is addressed to Eric  
8 Goldstein and Michael Prayor, with cc's to Donald Douglas, Marc  
9 Williams, Oneatha Swinton, and Kevin Conway. The papers don't  
10 explain to me who these people are. I assume they are somehow  
11 associated with the sports program at John Jay.

12 The subject line for the e-mail reads "PSAL at the  
13 John Jay Campus."

14 The e-mail reads as follows:

15 "Dear CEO Goldstein and Superintendent Prayor:

16 "I am writing to request your assistance in uniting  
17 the PSAL sports teams on the John Jay campus in Brooklyn. Our  
18 campus houses the Secondary School for Journalism, the John Jay  
19 School for law, Millennium Brooklyn High School, and Park Slope  
20 Collegiate. Currently the John Jay Campus Schools PSAL teams  
21 include students from Journalism, Law, PSC, and students from  
22 Brooklyn High School of the Arts on Dean Street. Millennium  
23 Brooklyn High School students belong to the Millennium High  
24 School PSAL teams that also include students from Millennium  
25 High School in Manhattan. The separate school programs, both

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1 of which practice and compete at the John Jay Campus  
2 (Millennium High School does not have a gym) offer vastly  
3 unequal opportunities to students.

4 "Prior to this school year, the John Jay Campus had  
5 only four teams. We were recently granted girls' cross country  
6 and girls' and boys' indoor and outdoor track, though we  
7 requested and were denied girls' and boys' swimming; girls'  
8 softball, flag football, double-dutch, and JV volleyball, as  
9 well as boys' volleyball and soccer. Meanwhile, the number of  
10 Millennium High School teams continues to grow.

11 "The principals of the schools at the John Jay Campus  
12 meet weekly to manage our shared campus. From the time that  
13 Millennium Brooklyn High School joined our campus community in  
14 2011, I have argued that they should be a part of our PSAL  
15 team. Nonetheless, they opted to join with Millennium High  
16 School (which opened in 2002) and, over the years, has been  
17 granted 17 teams. In spite of repeated requests to unite the  
18 teams and open up the opportunities that exist on the campus  
19 but that are denied to students from three of the four schools,  
20 Millennium Brooklyn High School maintains its exclusive  
21 alliance with Manhattan Millennium High School.

22 "The PTA at PSC has also raised these inequities with  
23 Executive Director Donald Douglas, but have heard nothing in  
24 response.

25 "The benefits of these separate and unequal programs

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1 to the students at Millennium Brooklyn High School and  
2 Manhattan Millennium High School do not justify the  
3 disadvantages imposed on the students from Brooklyn High School  
4 for the Arts, Law, Journalism, and PSC. Nor do whatever  
5 logistical difficulties may arise from uniting them. The  
6 students at all six schools are equally deserving of  
7 opportunities to participate in extracurricular sports, and it  
8 is the responsibility of the DOE and of PSAL to facilitate that  
9 equity.

10 "I look forward to hearing from you soon.

11 "Sincerely, Jill Bloomberg, Principal, Park Slope  
12 Collegiate," address, telephone numbers, fax and BlackBerry  
13 provided.

14 In addition to the text of the e-mail that I just  
15 read, plaintiff's e-mail also includes a chart showing that the  
16 John Jay Campus PSAL has nine sports teams for 1859 students,  
17 while the Millennium High School PSAL has 17 sports teams for  
18 1261 students. The chart also lists the enrollment at each of  
19 the relevant high schools along with the percentage of black  
20 and Hispanic students at each school. (*Id.*)

21 Plaintiff received no immediate response to her  
22 January 10, 2017 e-mail, (Cmplt. (Dkt. No. 1) ¶ 57) I say no  
23 immediate response because, on March 3, 2017 -- after the  
24 alleged retaliatory investigation had been initiated against  
25 plaintiff, Donald Douglas, the executive director of the PSAL,

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1 informed plaintiff and the other principals at the John Jay  
2 schools that the John Jay Campus PSAL would be granted five  
3 additional sports teams. (Supp. Bloomberg Aff. (Dkt. No. 21) ¶  
4 10) Douglas stated, however, that the two sports programs at  
5 John Jay would not be merged. (*Id.*)

6 I will now discuss the alleged retaliatory  
7 investigation that is the premise for this lawsuit.

8 On May 12, 2016, the Special Commissioner of  
9 Investigation for the New York City Public Schools, the "SCI,"  
10 received an anonymous tip that plaintiff was engaged in  
11 improper political activities with her students at PSC. SCI is  
12 an independent investigative agency that is part of the New  
13 York City Department of Investigation. SCI is not part of the  
14 Department of Education.

15 The unanimous tipper reported to SCI that plaintiff  
16 was "a member of a political organization known as the  
17 Progressive Labor Party and was actively recruiting students  
18 into the organization and inviting them to participate in  
19 organizational activities, including marches." (Guerra Decl.  
20 (Dkt. No. 17) ¶¶ 5-6, 11) Consistent with its normal practice  
21 concerning complaints of this sort, the next day -- May 13,  
22 2016 -- SCI referred the matter to the Office of Special  
23 Investigations, or "OSI." OSI is an investigative unit within  
24 the Department of Education that investigates matters SCI  
25 refers to OSI. (*Id.* ¶¶ 5, 12)



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1 OSI concluded that there was insufficient information  
2 to pursue the complaint; and, given that the identity of the  
3 complainant was unknown, OSI marked the complaint as  
4 closed pending additional information. (*Id.* ¶ 13)

5 On December 20, 2016, however, the anonymous tipper  
6 contacted SCI again, and provided SCI with additional  
7 information concerning plaintiff. (*Id.* ¶ 14) The complainant  
8 said, among other things, that plaintiff's husband had filmed a  
9 documentary for a foundation affiliated with the Progressive  
10 Labor Party; that plaintiff's husband is the president of the  
11 foundation; that students and staff were included in the  
12 documentary without having given their permission; that the  
13 documentary was screened on the premises of PSC and that a \$20  
14 admission fee was charged to those who attended; and that a  
15 bake sale was held at PSC to raise funds for a May Day march.  
16 (*Id.* ¶¶ 14-16)

17 On January 25, 2017, about two weeks after plaintiff  
18 had sent her January 10, 2017 e-mail regarding the sports  
19 programs at John Jay, SCI sent the new information on to OSI  
20 (*Id.* ¶ 17). Based on the new information, OSI was able to  
21 identify and interview the previously anonymous complainant.  
22 (*Id.* ¶ 19) On February 1, 2017, OSI decided to reopen its  
23 investigation based on the information provided by the  
24 complainant, and OSI assigned the complaint to an investigator.  
25 (*Id.* ¶¶ 18, 21)

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1           On March 2, 2017, the OSI investigator began  
2     conducting witness interviews at PSC (*Id.* ¶ 22) and the  
3     investigator informed plaintiff that she was under  
4     investigation. (Cmplt. (Dkt. No. 1) ¶ 60). The investigator  
5     refused to tell plaintiff why she was under investigation,  
6     however. (*Id.*)

7           That same day, the investigator told PSC's assistant  
8     principal that the investigation of plaintiff related to  
9     "Communist activities taking place at the school." (*Id.* ¶ 62)  
10    The investigator showed the assistant principal a list of names  
11    and asked her to identify who from the list had engaged in  
12    Communist activities. (*Id.*) The list included plaintiff, four  
13    current teachers at PSC, six former PSC teachers, plaintiff's  
14    family members, employees associated with after-school  
15    programs, and former students. (*Id.*)

16           On March 20, 2017, a number of PSC teachers received  
17    subpoenas from the OSI asking them to appear for an interview.  
18    (Bloomberg Aff. (Dkt. No. 10) ¶ 34)

19           On March 22, 2017, plaintiff's lawyer sent a letter to  
20    the Department of Education's general counsel demanding that  
21    the investigation of plaintiff be stopped and threatening a  
22    lawsuit if the investigation was not immediately closed.  
23    (March 22, 2017 Pltf. Ltr. (Dkt. No. 10-5)). The letter  
24    claimed that OSI's investigation was being conducted in  
25    retaliation for plaintiff's January 10, 2017 e-mail to

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1 Goldstein and Prayor, in which she complained about the  
2 allegedly segregated sports programs being offered at John Jay.  
3 (*Id.*)

4 In a March 27, 2017 letter, DOE provided further  
5 details about the nature of its investigation of plaintiff. As  
6 an initial matter, DOE stated that OSI's investigation was  
7 unrelated to plaintiff's complaint about the sports teams at  
8 John Jay. DOE pointed out that the investigation was  
9 originally opened in May 2016, based on a complaint received at  
10 that time. DOE also states that, in deciding to pursue the  
11 investigation, OSI had "no knowledge of any complaint lodged by  
12 Ms. Bloomberg within the Public Schools Athletic League  
13 concerning racial segregation in the sports teams." DOE also  
14 pointed out that "it would not be appropriate for school staff  
15 to solicit students to participate in any political events or  
16 to encourage them to support a particular political group or  
17 party." (March 27, 2017 DOE Ltr. (Dkt. No. 10-6))

18 Plaintiff's counsel responded in a March 28, 2017  
19 letter that OSI's decision to "sit on a complaint for a year"  
20 and then commence an investigation after plaintiff complained  
21 about the sports programs demonstrated that the investigation  
22 was retaliatory. As to DOE's references to improper political  
23 activities, plaintiff complained that DOE had not provided any  
24 specifics concerning plaintiff's alleged improper conduct, or  
25 cited any regulation that had been violated. Plaintiff

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1 reiterated her demand that the investigation be terminated and  
2 her threat to move forward with a lawsuit if it was not.

3 (March 28, 2017 Pltf. Ltr. (Dkt. No. 10-7))

4 In an April 6, 2017 letter, DOE addressed plaintiff's  
5 demand for specifics concerning the complaint OSI was  
6 investigating and provided an explanation for the delay in  
7 pursuing the May 2016 complaint:

8 "The complaint being investigated is that plaintiff  
9 and two teachers at the Park Slope Collegiate school are  
10 members of a Communist organization known as the Progressive  
11 Labor Party, that they are actively recruiting students into  
12 the organization during school hours, and that they invite  
13 students to participate in the organization's activities,  
14 including marches for communism. If substantiated, this could  
15 constitute a violation of Chancellor's Regulation D-130, which  
16 provides, in part, that staff may not be involved in any  
17 activities on behalf of a political organization during working  
18 hours." (April 6, 2017 DOE Ltr. (Dkt. No. 10-8))

19 Chancellor's Regulation D-130 states that "the use of  
20 any Department of Education school during school/business hours  
21 by any person, group, organization, committee, etc., on behalf  
22 of or for the benefit of any political organization/committee  
23 is prohibited."

24 This regulation further provides that DOE "personnel  
25 may not be involved in any activities, including fundraising on

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1      behalf of any political organization/committee during working  
2      hours." (Chickedantz Affirm. (Dkt. No. 4) Ex. B at 2) In  
3      connection with this lawsuit, DOE has also asserted that  
4      plaintiff may have violated Chancellor's Regulation D-180,  
5      which forbids the use of school facilities, equipment, and  
6      supplies on behalf of political organizations; Chancellor's  
7      Regulation C-110, which concerns conflicts of interest; as well  
8      as the City of New York's conflict of interest laws. (Guerra  
9      Decl. (Dkt. No. 17) ¶¶ 31-34)

10             As to the delay in pursuing the investigation of the  
11      complaint, the DOE responded as follows:

12             "You also inquired about the delay in the OSI  
13      investigation. The complaint was initially filed with a  
14      Special Commissioner of Investigation for the New York City  
15      public schools (SCI) in May of 2016. As permitted by the  
16      Mayoral Executive Order establishing SCI, SCI referred the  
17      complaint to OSI. The complainant supplied further information  
18      in December 2016, and thereafter, OSI began its investigation."  
19      (April 6, 2017 DOE Ltr. (Dkt. No. 10-8))

20             Plaintiff filed this action on April 28, 2017,  
21      asserting claims for retaliation under the First Amendment to  
22      the United States Constitution, Title VI of the Civil Rights  
23      Act of 1964, 42 United States Code § 2000d-1 et seq., as well  
24      as the New York City Human Rights Law, New York City  
25      Administrative Code 8-101 et seq. (Dkt. No. 1) Plaintiff has

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1 moved for a temporary restraining order and a preliminary  
2 injunction enjoining the DOE's investigation of her pending the  
3 outcome of this litigation. (Dkt. No. 3)

4 As to the standard for the issuance of injunctive  
5 relief, a court may issue injunctive relief only where, first,  
6 the plaintiff has demonstrated either (a) a likelihood of  
7 success on the merits or (b) sufficiently serious questions  
8 going to the merits to make them a fair ground for litigation  
9 and a balance of hardships tipping decidedly in the plaintiff's  
10 favor. Second, the court may issue the injunction only if the  
11 plaintiff has demonstrated that she is likely to suffer  
12 irreparable injury in the absence of an injunction. Third, a  
13 court must consider the balance of hardships between the  
14 plaintiff and defendant and issue the injunction only if the  
15 balance of hardships tips in the plaintiff's favor. Finally,  
16 the court must ensure that the public interest would not be  
17 disserved by the issuance of a preliminary injunction.  
18 *Salinger v. Colting*, 607 F.3d 68, at pages 79-80 (2d Cir.  
19 2010).

20 "However, when a party seeks an injunction that will  
21 affect governmental action taken in the public interest  
22 pursuant to a statutory or regulatory scheme, the plaintiff  
23 must typically show a likelihood of success on the merits. A  
24 serious question going to the merits is usually insufficient,  
25 even if the balance of hardships tips decidedly in the

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1 applicant's favor." *Mullins v. City of New York*, 626 F.3d 47,  
2 53 (2d Cir. 2010).

3 Here, plaintiff seeks an injunction prohibiting the  
4 DOE from proceeding with its investigation of her.  
5 Accordingly, plaintiff asks this court to block the Department  
6 of Education from taking governmental action pursuant to a  
7 statutory or regulatory scheme, namely, the Chancellor's  
8 regulations and the New York City conflict of interest laws. I  
9 conclude that plaintiff must show a likelihood of success on  
10 the merits in order to obtain the injunction she seeks. See  
11 *Id.*

12 I will first address whether plaintiff has shown a  
13 likelihood of success on her First Amendment retaliation claim:

14 With respect to likelihood of success:

15 As a DOE employee, plaintiff is considered a public  
16 employee. A public employee asserting a First Amendment  
17 retaliation claim "must establish that: (1) her speech or  
18 conduct was protected by the First Amendment; (2) the defendant  
19 took an adverse action against her; and (3) there was a causal  
20 connection between this adverse action and the protected  
21 speech," *Matthews v. City of New York*, 779 F.3d 167, 172 (2d  
22 Cir. 2015).

23 The first factor, whether the speech was protected by  
24 the First Amendment, "encompasses two separate subquestions:  
25 (1) whether the subject of the employee's speech was a matter

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1 of public concern; and (2) whether the employee spoke as a  
2 citizen rather than solely as an employee." *Id.* "If the  
3 answer to either question is no, that is the end of the  
4 matter." *Id.*

5 With respect to the first subquestion, "a matter of  
6 public concern is one that relates to a matter of public,  
7 social, or other concern to the community." *Looney v. Black*,  
8 702 F.3d 701, 710 (2d Cir. 2012). As to the second  
9 subquestion, in determining whether a plaintiff was speaking as  
10 an employee or as a citizen, courts consider whether (1) the  
11 speech "falls outside of the employee's official  
12 responsibilities," and (2) whether a "civilian analogue" for  
13 the speech exists. *Matthews*, 779 F.3d at 173.

14 "In the First Amendment context, the state has  
15 interests as an employer in regulating the speech of its  
16 employees that differ significantly from those it possesses in  
17 connection with regulation of the speech of the citizenry in  
18 general." *Ross v. Breslin*, 693 F.3d 300, 305 (2d Cir. 2012).  
19 Speech by a public employee is protected by the First Amendment  
20 only when the employee is speaking "as a citizen on a matter of  
21 public concern." *Id.* In *Garcetti v. Ceballos*, the Supreme  
22 Court held that "when public employees make statements pursuant  
23 to their official duties, the employees are not speaking as  
24 citizens for First Amendment purposes, and the Constitution  
25 does not insulate their communications from employer



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1 discipline." *Id.* This is the case even when the subject of an  
2 employee's speech is a matter of public concern. *Id.*

3 A plaintiff speaks pursuant to her official job duties  
4 when the speech at issue "owes its existence to those job  
5 duties" (*Id.* at 308) or when the speech is "part-and-parcel [of  
6 the employee's] concerns about her ability to properly execute  
7 her duties." *Weintraub v. Board of Education*, 593 F.3d 196,  
8 203 (2d Cir. 2010).

9 Here, plaintiff has not shown a likelihood of success  
10 as to the first element of a First Amendment retaliation claim.  
11 Although plaintiff's January 10, 2017 e-mail complains about  
12 "separate and unequal sports programs" at John Jay, and that is  
13 certainly a matter of public concern, the evidence before the  
14 court demonstrates that plaintiff made her complaint to her  
15 supervisor and to the overseer of the PSAL program "pursuant to  
16 her official duties" as PSC's principal, rather than as a  
17 citizen. See *Ross*, 693 F.3d at 305.

18 Indeed, plaintiff concedes that fighting for an  
19 appropriate number of sports teams for PSC students was part of  
20 her job as PSC's principal. In her supplemental affidavit,  
21 plaintiff says the following:

22 "Throughout my career, the Public School Athletic  
23 League ('PSAL') has had the budget for sports programs. I, as  
24 a principal, do not have any dedicated funds for sports  
25 programs. Any sports programs we want must be applied for to

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1 PSAL. It is part of a principal's or other school employee's  
2 regular job duties to request sports teams of the PSAL. For  
3 years, principals and coaches in the John Jay program had been  
4 making these formal requests, but our requests were regularly  
5 rejected." (Supp. Bloomberg Aff. (Dkt. No. 21 at ¶ 5))

6 The essence of plaintiff's January 10, 2017 e-mail is  
7 that the schools that make up the John Jay Campus PSAL are not  
8 being treated fairly with respect to the number of sports teams  
9 their schools are authorized to have, and plaintiff  
10 demonstrates that unfairness by pointing out that the  
11 Millennium schools, which have fewer students, are authorized  
12 for more sports teams. And while it is true that plaintiff  
13 includes statistics showing that the percentage of black and  
14 Hispanic students is higher at the John Jay Campus schools as  
15 opposed to the Millennium schools, the essence of her argument  
16 is that "the students at all six schools are equally deserving  
17 of opportunities to participate in extracurricular sports, and  
18 it is the responsibility of the DOE and of PSAL to facilitate  
19 that equity." (Bloomberg Aff., Ex. 3 (Dkt. No. 10-3))

20 Plaintiff's January 10 e-mail was a plea for resources  
21 and a plea for fairness as to the availability of  
22 extracurricular sports teams at John Jay. And plaintiff made  
23 this appeal in the form of an internal e-mail to her direct  
24 supervisor and the DOE manager responsible for overseeing the  
25 PSAL program. I conclude that sending this e-mail falls well

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1 within the scope of plaintiff's duties and responsibilities as  
2 PSC's principal. This e-mail was "part-and-parcel of  
3 plaintiff's concerns about her ability to properly execute her  
4 duties" as PSC's principal. More specifically, it was part of  
5 plaintiff's duties as PSC's principal to request appropriate  
6 sports teams from PSAL and, more broadly, to do what she could  
7 to ensure that DOE was providing programs and services for her  
8 students on an equitable basis. See *Weintraub*, 593 F.3d at  
9 203.

10 *Matthews v. City of New York*, 779 F.3d 167 (2d Cir.  
11 2015), cited by plaintiff, is not to the contrary. In  
12 *Matthews*, the Second Circuit held that a police officer -- in  
13 complaining to a supervisor about a precinctwide quota system,  
14 which he argued was "causing unjustified stops" and harming the  
15 precinct's relationship with the community -- had engaged in  
16 speech in his capacity as a private citizen and not as a police  
17 officer. *Matthews*, 779 F.3d at 173-75. The *Matthews* court  
18 found that the police officer's "speech to the precinct's  
19 leadership was not what he was employed to do, nor was it  
20 part-and-parcel of his regular job. The officer's  
21 policy-oriented speech was neither part of his job description  
22 nor part of the practical reality of his everyday work." *Id.*  
23 at 174.

24 The circumstances here are entirely different. As I  
25 noted, plaintiff concedes that it was part of her job as PSC's

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1 principal to request sports teams and to do what she could to  
2 ensure that her students received adequate resources and  
3 funding on an equitable basis with other schools. This was  
4 "part of the practical reality of plaintiff's everyday work" as  
5 principal of PSC. *Cf. id.*; see also Ross 693 F.3d at 305  
6 (payroll clerk -- whose responsibilities included "making sure  
7 pay rates were correct" and flagging "payroll  
8 irregularities" -- acted pursuant to her official duties even  
9 though she had gone "outside the chain of command by writing to  
10 the Board of Education" about pay discrepancies).

11 Although plaintiff also argues that her e-mail has a  
12 "citizen analogue," (See Pltf. Reply Br. (Dkt. No. 23) at pages  
13 10-11) the existence of a citizen analogue is not dispositive.  
14 See *Weintraub*, 593 F.3d at 203-204 ("When a public employee  
15 speaks pursuant to employment responsibilities, there is no  
16 relevant analogue to speech by citizens who are not government  
17 employees") See also *Garcetti*, 547 U.S. at 421 ("controlling  
18 factor" was whether the speech was "made pursuant to a party's  
19 duties as a calendar deputy").

20 Because the evidence before the court demonstrates  
21 that plaintiff sent her January 10, 2017 e-mail to her  
22 supervisor and to the DOE manager of the district's sports  
23 programs as part of her official duties as PSC's principal, she  
24 has not shown a likelihood of success as to the first element  
25 of her First Amendment retaliation claim.

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1           With respect to the second element of a First  
2 Amendment retaliation claim, the adverse employment action  
3 requirement, retaliatory conduct that would deter a similarly  
4 situated individual of ordinary firmness from exercising his or  
5 her constitutional rights constitutes an adverse action.  
6 *Rivers v. New York City Housing Authority*, 176 F.Supp.3d 229,  
7 244 (S.D.N.Y. 2016); *see also Manon v. Pons* 131 F.Supp.3d 219,  
8 232 (S.D.N.Y. 2015) ("The standard for an adverse action in the  
9 context of First Amendment retaliation is substantially similar  
10 to the same inquiry in the Title VII retaliation context").  
11 "in this it context, adverse employment actions include  
12 discharge, refusal to hire, refusal to promote, demotion,  
13 reduction in pay, and reprimand." *Zelnik v. Fashion Institute*  
14 *of Technology*, 464 F.3d, 217, 226 (2d Cir. 2006). The Second  
15 Circuit has stated that "lesser actions may also be considered  
16 adverse employment actions," including negative evaluation  
17 letters, assignment of undesirable duties, or transfers under  
18 certain circumstances. *Morris v. Lindau*, 196 F.3d 102, 110 (2d  
19 Cir. 1999).

20           At issue here is whether the mere initiation of an OSI  
21 investigation into plaintiff constitutes an adverse employment  
22 action. Some courts have found that an investigation, without  
23 attendant negative consequences, does not constitute adverse  
24 action. *See Alvarez v. City of New York*, 2 F.Supp.2d 509, 514  
25 (S.D.N.Y. 1998) ("Although plaintiff argues that the

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1 investigation itself has chilled his speech, I am not persuaded  
2 that the mere initiation of an internal investigation [by the  
3 NYPD] itself would cause irreparable harm."). Other courts  
4 have come to the opposite conclusion, however. See *Eldridge v.*  
5 *Rochester City School District*, 968 F.Supp.2d 546, 560  
6 (W.D.N.Y. 2013) (concluding that "the pressure of an internal  
7 investigation coupled with a veiled threat of an involuntary  
8 transfer could dissuade a reasonable employee from engaging in  
9 protected activity"); *Mullins*, 634 F.Supp.2d 373, 389  
10 (recognizing that "an active IAB investigation constituted an  
11 adverse action to plaintiffs" because the investigation  
12 deterred reasonable police officers from pursuing rights in  
13 court").

14 For purposes of resolving the motion for a TRO and  
15 preliminary injunction, I have assumed that the commencement of  
16 an OSI investigation would plausibly deter a similarly situated  
17 individual of ordinary firmness from exercising their First  
18 Amendment rights. See *Rivers*, 176 F.Supp.3d at 244.  
19 Accordingly, I have assumed that plaintiff has shown a  
20 likelihood of success on this element.

21 As to the last element, "the causal connection must be  
22 sufficient to warrant the inference that the protected speech  
23 was a substantial motivating factor in the adverse employment  
24 action, that is to say, the adverse employment action would not  
25 have been taken absent the employee's protected speech."

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1     *Stajic v. City of New York*, 2016 WL 5717573, at \*4 (S.D.N.Y.  
2     Sept. 30, 2016). "Causation can be established either  
3     indirectly by means of circumstantial evidence, for example, by  
4     showing that the protected activity was followed by adverse  
5     treatment in employment, or directly by evidence of retaliatory  
6     animus." *Id.* A plaintiff may rely on temporal proximity to  
7     demonstrate a causal connection.

8             Here, plaintiff argues that the requisite causal  
9     connection between her protected activity -- that is, the  
10    January 10 e-mail -- and the adverse action is established by  
11    the temporal proximity between the two events. Here, about  
12    three weeks passed between plaintiff's January 10, 2017 e-mail  
13    and the reopening of the investigation. Three weeks "fits  
14    comfortably within" the "time period that can give rise to an  
15    inference of causation." *Nagle v. Marron*, 663 F.3d 100, 111  
16    (2d Cir. 2011) (discussing six-week period).

17            Despite this temporal proximity, plaintiff has not  
18    shown a likelihood of success on the causation element of her  
19    retaliation claim, because there is no evidence that the  
20    "specific decision-maker responsible for the adverse action" --  
21    that is, OSI -- was aware of plaintiff's January 10, 2017  
22    e-mail at the time OSI reopened its investigation of plaintiff.  
23    Indeed, defendants have offered evidence affirmatively  
24    demonstrating that "OSI was not aware that plaintiff had sent  
25    the January 10, 2017 e-mail regarding sports programs at PSC."

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1 (Guerra Decl. (Dkt. No. 17) at ¶ 20) A DOE lawyer has  
2 submitted an affidavit citing that prior to a March 13, 2017  
3 meeting with the complainant, the OSI investigator assigned to  
4 investigate the complaint had no knowledge of plaintiff's  
5 January 10, 2017 e-mail. It was only during the March 13, 2017  
6 interview of the complainant, at which the complainant produced  
7 a newsletter issued by the PSC PTA, that the OSI investigator  
8 learned of PSC's complaints concerning sports teams. Even  
9 then, the investigator was not made aware that it was plaintiff  
10 who had made the complaint. (Supp. Guerra Aff. (Dkt. No. 27)  
11 ¶¶ 7-10 and Ex. A) there is no evidence before the court  
12 rebutting or tending to rebut DOE's showing.

13 Moreover, the circumstances surrounding the initiation  
14 of the investigation do not suggest that plaintiff's January  
15 10, 2017 e-mail was a "substantial motivating factor" in the  
16 investigation. The record shows that SCI -- an independent  
17 investigative agency that is not part of the Department of  
18 Education -- received the original complaint against plaintiff  
19 in May 2016. (Guerra Decl. (Dkt. No. 17) ¶ 11)

20 SCI referred the matter to OSI, but OSI decided to  
21 close the complaint because there was insufficient information  
22 and there was no ability to follow up with the anonymous  
23 complainant. (*Id.* ¶¶ 5, 12-13) On December 20, 2016, however,  
24 SCI received additional information concerning the May 2016  
25 complaint, and SCI forwarded that information to OSI on January



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1 25, 2017. (*Id.* ¶¶ 14, 18) Because there was now sufficient  
2 information to identify the anonymous complainant, OSI was able  
3 to interview the complainant about the complainant's  
4 allegations. (*Id.* ¶ 19) And OSI then decided to reopen the  
5 investigation on February 1, 2017, after having conducted that  
6 interview. (*Id.*, ¶ 18) Given that the reopening of the  
7 investigation turned on the receipt of additional information  
8 from the complainant -- information received by an  
9 investigative agency independent of the Department of  
10 Education -- the circumstances do not suggest that the  
11 reopening of the investigation of plaintiff was the product of  
12 retaliatory animus.

13 Accordingly, plaintiff has not demonstrated a  
14 likelihood of success on the causation element of her First  
15 Amendment retaliation claim.

16 Plaintiff has also not demonstrated that she will  
17 suffer irreparable harm with respect to her First Amendment  
18 retaliation claim. Plaintiff argues that, if an injunction is  
19 not granted, she will suffer irreparable harm because the OSI  
20 investigation "will have a chilling effect on [her and other  
21 PSC employees'] willingness to continue to speak out against  
22 racial segregation [and discrimination]." (Def. Opp. Br. (Dkt.  
23 No. 11) at pages 12-16).

24 It is well established that "violations of First  
25 Amendment rights are commonly considered irreparable injuries

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1 for the purposes of a preliminary injunction." *Bery v. City of*  
2 *New York*, 97 F.3d 689, 693 (2d Cir. 1996). However, as the  
3 Second Circuit has explained, "Courts treat claims of First  
4 Amendment abridgment differently, depending on the nature of  
5 the restriction on speech:

6 "On the one hand, where a plaintiff alleges injury  
7 from a rule or regulation that directly limits speech, the  
8 irreparable nature of the harm may be presumed. On the other  
9 hand, in instances where a plaintiff alleges injury from a rule  
10 or regulation that may only potentially affect speech, the  
11 plaintiff must establish a causal link between the injunction  
12 sought and the alleged injury. In those instances, the  
13 plaintiff must establish an actual chilling effect. And  
14 allegations of a subjective chill [of First Amendment rights]  
15 are not an adequate substitute for a claim of specific present  
16 objective harm or a threat of specific future harm." *Greer v.*  
17 *Mehiel*, 2016 WL 828128 at \*10 (S.D.N.Y. Feb. 24, 2016).

18 Here, plaintiff's claim fits into the second category  
19 of First Amendment claims, but because she argues not that a  
20 rule or regulation is directly restricting her speech, but  
21 rather that defendants' actions in conducting an OSI  
22 investigation will chill her and other employees at PSC from  
23 making future complaints of alleged racial discrimination.  
24 Plaintiff has not made an adequate showing of actual chilling  
25 effect, however.

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1           As to the chilling effect on her own speech, plaintiff  
2 states in her affidavit that "the OSI investigation has caused  
3 her a significant amount of distress" and that she is "afraid  
4 to speak out against race discrimination and segregation at her  
5 school." (Bloomberg Aff. (Dkt. No. 10) ¶ 49) Allegations of  
6 "subjective chill are not an adequate substitute" for an actual  
7 chilling effect, however. See *Greer*, 2016 WL 828128 \*10.  
8 "Where a party can show no change in her behavior, she has  
9 quite plainly shown no chilling of her First Amendment right to  
10 free speech." *Curley v. Village of Suffern*, 268 F.3d 65, 73  
11 (2d Cir. 2001) (plaintiff was not actually chilled by arrest  
12 made allegedly in retaliation for comments during 1993 mayoral  
13 campaign, because plaintiff ran again for public office in  
14 1995).

15           Here, the record shows that plaintiff has continued to  
16 challenge DOE's actions in this case and continued to speak out  
17 on issues of race more generally. For example, on March 29,  
18 2017, plaintiff held a meeting with staff and parents at PSC in  
19 which she discussed and provided an update concerning the OSI  
20 investigation. (Bloomberg Aff. (Dkt. No. 10) ¶ 42). Plaintiff  
21 discussed the alleged retaliatory nature of the investigation  
22 and the legal steps she was taking to address the  
23 investigation. (Guerra Decl. (Dkt. No. 17) at ¶ 28) She told  
24 those present that OSI's investigation "would end as a result  
25 of the cease-and-desist letter [her lawyers sent] or would be

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1 temporarily halted when her attorneys filed suit and requested  
2 a preliminary injunction." *Id.*

3 Moreover, on March 30, 2017, plaintiff participated in  
4 a panel discussion which was entitled "The Case for School  
5 Integration Now," and which was sponsored by the PSC PTA.  
6 (Supp. Bloomberg Aff. (Dkt. No. 14) at ¶ 32). These are not  
7 the actions of someone who has been actually chilled from  
8 speaking out on issues regarding discrimination in the New York  
9 City public school system.

10 As to the chilling effect of the OSI investigation on  
11 other teachers and staff at PSC, the chilling effect on these  
12 employees' speech -- as opposed to their willingness to report  
13 violations of federal statutes -- is not relevant to  
14 plaintiff's First Amendment retaliation claim. See *Alvarez v.*  
15 *City of New York*, 2 F.Supp.2d 509, 514 (S.D.N.Y. 1998) ("to the  
16 extent that plaintiff speculates that other employees' speech  
17 may be chilled by the [NYPD's internal affairs] investigation,  
18 their First Amendment rights are not at issue.") Although  
19 plaintiff cites *Muchmore's Café, LLC v. City of New York*, 2016  
20 U.S. Dist. LEXIS 139861 (E.D.N.Y. 2016) for the proposition  
21 that a plaintiff is "entitled to rely on the impact of the  
22 [government action] on the expressive activities of others as  
23 well as her own" (Pltf. Reply Br. (Dkt. No. 23) at page 12),  
24 plaintiff's reliance on this case is misplaced. In *Muchmore*,  
25 the plaintiff proceeded on a theory of third-party standing in

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1 challenging the constitutionality of the New York City Cabaret  
2 Law. See *Id.* at \*14-17. Under those circumstances, the  
3 chilling effect of the government ordinance was relevant to  
4 plaintiff's claim. In the context of First Amendment  
5 retaliation, however, where the claim at issue is asserted on  
6 behalf of plaintiff only, the chilling effect on others is not  
7 relevant. Stated another way, where the record demonstrates  
8 that the named plaintiff has not been actually chilled, this  
9 defect cannot be cured or remedied by attempting to show that  
10 third parties' exercise of First Amendment rights has been  
11 actually chilled.

12 With respect to the First Amendment retaliation claim,  
13 I conclude that plaintiff has not demonstrated a likelihood of  
14 success or irreparable harm.

15 I will now turn to the Title VI and New York City  
16 Human Rights Law claims, beginning with the likelihood of  
17 success on the merits of those claims.

18 Title VI provides that "no person in the United States  
19 shall, on the ground of race, color, or national origin, be  
20 excluded from participation in, be denied the benefits of, or  
21 be subjected to discrimination under any program or activity  
22 receiving federal financial assistance." 42 U.S.C. § 2000d.  
23 It is undisputed that the DOE receives federal financial  
24 assistance.

25 "The same analysis that applies to claims of

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1 retaliation under Title VII also applies to claims under Title  
2 VI." *Belgrave v. City of New York*, 1999 WL 692034, at \*38  
3 (E.D.N.Y. Aug. 31, 1999). "Specifically, a plaintiff must make  
4 out a *prima facie* case by showing that: (1) she was engaged in  
5 a protected the activity; (2) her employer was aware of that  
6 activity; (3) she suffered an adverse employment action; and  
7 (4) there was a causal connection between the protected  
8 activity and the adverse action." *Id.* If, after a plaintiff  
9 establishes a *prima facie* case of retaliation, the defendant  
10 "offers a legitimate, nonretaliatory reason for [the adverse  
11 action], the presumption of retaliation drops from the case and  
12 the burden shifts to plaintiff to show that the "proffered  
13 reason was a pretext for unlawful retaliation." *Koumantaros v.*  
14 *City University of New York*, 2007 WL 840115, at \*12 (S.D.N.Y.  
15 March 19, 2007).

16 With respect to the first factor, there is no question  
17 that plaintiff engaged in a protected activity when she sent  
18 the January 10, 2017 e-mail to her supervisor and the overseer  
19 of PSAL programs complaining about racial discrimination in the  
20 sports programs offered at the John Jay complex.

21 As to the second factor, it is also clear that the DOE  
22 was aware of her complaint. As a general matter, the  
23 "knowledge requirement is met if the legal entity was on  
24 notice" of the protected activity. *Papelino v. Albany College*  
25 *of Pharmacy*, 633 F.3d 81, 92 (2d Cir. 2011); see also *Gordon v.*

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1 *New York City Board of Education*, 232 F.3d 111, 116 (2d Cir.  
2 2000) ("neither this nor any other circuit has ever held that,  
3 to satisfy the knowledge requirement, anything more is  
4 necessary than general corporate knowledge that the plaintiff  
5 had engaged in protected activity"). Because plaintiff sent  
6 her January 10, 2017 e-mail to her superiors within the DOE --  
7 specifically the individual in charge of DOE's PSAL programs  
8 and to her direct supervisor, who serves as superintendent of  
9 District 15 -- the DOE had corporate knowledge of her protected  
10 activity. See *Joseph v. Owens & Minor Distribution, Inc.*, 5  
11 F.Supp.3d 295, 318 (E.D.N.Y. 2014) (defendant's knowledge of  
12 protected activity established where "at least two managers  
13 were aware" of the activity).

14 With respect to the third factor, I have assumed that  
15 the initiation of an OSI investigation constitutes an adverse  
16 employment action.

17 With respect to the fourth element, "plaintiff may  
18 show a causal connection either (1) indirectly, by presenting  
19 evidence of temporal proximity between the protected activity  
20 and adverse action, or through other evidence such as different  
21 treatment of similarly situated individuals, or (2) directly,  
22 through evidence of retaliatory animus directed against  
23 plaintiff by the defendant. *Koumentaros*, 2007 WL 840115, at  
24 \*10. Here, plaintiff relies on temporal proximity between the  
25 protected activity and the adverse action to demonstrate a

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1 causal connection. As I stated earlier, about three weeks  
2 passed between plaintiff's January 10 e-mail and the reopening  
3 of the OSI investigation of her.

4 While a plaintiff need only show "general corporate  
5 knowledge" to establish that her employer was aware of her  
6 protected activity, *see Gordon*, 232 F.3d at 116, "evidence that  
7 the specific decision-makers responsible for the adverse action  
8 were not aware of a plaintiff's protected activity is relevant  
9 "as some evidence of a lack of causal connection countering  
10 plaintiff's circumstantial evidence of proximity." *Giscombe v.*  
11 *New York City Department of Education*, 39 F.Supp.3d 396, 402  
12 (S.D.N.Y. 2014).

13 Here, as I explained in the context of the First  
14 Amendment retaliation claim, DOE has offered evidence rebutting  
15 the inference flowing from temporal proximity. There is no  
16 evidence before me suggesting that the "specific decision-maker  
17 responsible for the adverse action," that is, OSI, was aware of  
18 the January 10, 2017 e-mail at the time it reopened its  
19 investigation of plaintiff. Indeed, the evidence is all to the  
20 contrary. *See Guerra Decl.* (Dkt. No. 17) at ¶ 20; *Supp. Guerra*  
21 *Aff.* (Dkt. No. 27) ¶¶ 7-10 and Ex. A. Moreover, as I explained  
22 earlier, the process by which the investigation was reopened --  
23 in particular the fact that it was initiated based on a  
24 referral from SCI, an independent investigative agency outside  
25 of the DOE -- tends to undermine any assertion of retaliatory



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1 animus.

2 I find that plaintiff has not demonstrated a  
3 likelihood of success as to causation, which is the fourth  
4 element of a Title VI retaliation claim.

5 With respect to the New York City Human Rights Law  
6 claim, although the retaliation inquiry under the city Human  
7 Rights Law is broader than its federal counterpart, *Fincher v.*  
8 *Deposit Trust & Clearing Corporation*, 604 F.3d 712, 723 (2d  
9 Cir. 2010), "a plaintiff must still establish that there was a  
10 causal connection between her protected activity and the  
11 employer's subsequent action." *Peña-Barrero v. City of New*  
12 *York*, 2017 WL 1194477, at \*19 (S.D.N.Y. March 30, 2017). I  
13 have concluded that plaintiff has not shown a likelihood of  
14 success as to the causation element of her Title VI claim. I  
15 reach the same conclusion as to her city Human Rights Law  
16 claim.

17 As to irreparable injury, plaintiff argues that she  
18 has shown irreparable injury because (1) she and other DOE  
19 employees will be "chilled from speaking out against  
20 discrimination" if an injunction is not granted, and (2) "PSC  
21 employees will feel dissuaded from participating in the instant  
22 litigation for fear of retaliation." (Pltf. Moving Br. (Dkt.  
23 No. 14) at page 12; and Bloomberg Aff. (Dkt. No. 10) at ¶¶ 50,  
24 53). Plaintiff also states that she fears being removed from  
25 her position as principal at PSC (Bloomberg Aff. (Dkt. No. 10)

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¶¶ 50, 53).

To the extent that plaintiff argues that she personally has been or will be chilled or deterred from making future complaints about racial discrimination in the New York City public school system, as I explained previously, I conclude that plaintiff has not actually been chilled by the initiation of the OSI investigation.

As to plaintiff's contention that other employees will be deterred from making similar complaints of racial discrimination or from participating in the present lawsuit as witnesses on her behalf, the Second Circuit has recognized that "unchecked retaliation subverts the purpose of" certain federal statutes and that "the resulting weakened enforcement of federal law can itself be irreparable harm in the context of a preliminary injunction application." *Mullins*, 626 F.3d at 55; *see also, Holt v. Control Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983). "A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the law or from providing testimony for a plaintiff in her effort to protect her own rights. These risks may be found to constitute irreparable injury." *Moore v. Consolidated Edison Company of New York*, 409 F.3d 506, 511-12 (2d Cir. 2005).

The Second Circuit, however, has rejected the notion that "there is irreparable injury sufficient to warrant a

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1 preliminary injunction in every retaliation case." *Holt*, 708  
2 F.2d at 91.

3 Here, plaintiff has submitted affidavits from a number  
4 of PSC employees concerning the effect of the OSI  
5 investigation. (See Dkt. Nos. 5-9, 22.) The affidavits state,  
6 among other things, that teachers are "fearful of standing up  
7 for their students and speaking out against race  
8 discrimination" and "noticeably less comfortable speaking out  
9 against racism." (See Williams Aff. (Dkt. No. 9) at ¶ 7,  
10 Sandusky Aff. (Dkt. No. 8) ¶ 4). The affidavits also reference  
11 at least five other PSC employees who have chosen to remain  
12 anonymous and state that they will not publicly support  
13 plaintiff's case for fear of retaliation. (See Supp.  
14 Chickedantz Affirm. (Dkt. No. 22)).

15 This court takes very seriously -- as DOE should --  
16 plaintiff's allegations about the negative effects of the OSI  
17 investigation on the PSC community. There has been, however,  
18 an enormous outpouring of support for plaintiff in the short  
19 lifespan of this litigation. At the hearing on Monday, the  
20 courtroom was standing room only. I would estimate that 150  
21 people or so showed up in support of plaintiff. There has been  
22 a similar turnout today.

23 In addition to the affidavits from the PSC teachers,  
24 including from one teacher who had been subpoenaed by OSI,  
25 (Dkt. No. 7) hundreds of people in the PSC community have

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1 signed petitions supporting plaintiff. (Bloomberg Aff. (Dkt.  
2 No. 10) ¶¶ 45-46). These circumstances do not warrant a  
3 finding of irreparable harm based on the investigation's  
4 alleged effect on others or based on the argument that the OSI  
5 investigation presents a significant risk of weakening  
6 enforcement of federal law or prejudice in plaintiff's case.

7 Finally, to the extent that plaintiff asserts  
8 irreparable harm based on her fears that she may lose her job  
9 (Bloomberg Aff. (Dkt. No. 10) at ¶ 49) her concerns do not rise  
10 to the level of irreparable harm. As an initial matter, the  
11 OSI investigation presents no immediate risk of plaintiff  
12 losing her job. Plaintiff has due process rights that would be  
13 triggered in the event of any effort by DOE to terminate her  
14 employment. Moreover, "irreparable injury is one that cannot  
15 be addressed through a monetary award. Where money damages are  
16 adequate compensation, a preliminary injunction should not  
17 issue." *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79  
18 (2d Cir. 1990). It is well established that, in the employment  
19 context, "reinstatement and money damages are both forms of a  
20 trial court's remedies" that can be used to make a plaintiff  
21 whole for any loss suffered as a result of an adverse  
22 employment action. *Bagley v. Yale University*, 2014 WL 7370021  
23 at \*10 (D. Conn. Dec. 29, 2014). Similarly, on an appropriate  
24 record, damages related to emotional distress are compensable  
25 at the conclusion of a litigation such as this.

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1 I conclude that plaintiff has not shown a likelihood  
2 of success or irreparable injury with respect to her  
3 retaliation claims under the First Amendment, under Title VI,  
4 or under the New York City Human Rights Law. Accordingly,  
5 plaintiff's application for a temporary restraining order and a  
6 preliminary injunction is denied.

7 Plaintiff will advise the court by May 10, 2017, how  
8 she wishes to proceed with this litigation.

9 Is there anything further?

10 MS. MIRER: Your Honor, I do have a few points that I  
11 would like to raise with the court.

12 THE COURT: Go ahead.

13 MS. MIRER: First of all, with respect to D-130, when  
14 the court described what D-130 is, it was not the actual  
15 description --

16 THE COURT: It actually was a direct quote.

17 MS. MIRER: Well, the direct quote --

18 THE COURT: It was a direct quote from the regulation.  
19 It wasn't a full quote. It was a direct quote.

20 MS. MIRER: Okay. Your Honor, I want --

21 THE COURT: I read the relevant parts of the  
22 regulation.

23 MS. MIRER: With respect to the issue of D-130, if you  
24 noticed in our brief, we raised the issue of the idea --

25 THE COURT: The lawsuit is not about the alleged

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1 unconstitutional of D-130 that you mentioned for the first  
2 time in your reply brief. The lawsuit is about whether the OSI  
3 investigation is retaliatory. That's what the lawsuit is  
4 about.

5 MS. MIRER: I certainly understand that, your Honor.  
6 What I am raising is a question of the idea that we are going  
7 to be -- in terms of the OSI investigation, it has no  
8 parameters. It could be a total fishing expedition. And I  
9 think, with respect to the issues involved, there should be at  
10 least some narrow tailoring to the question of these  
11 allegations put forth, in that we are not going into a  
12 wholesale investigation of people's political beliefs. And  
13 that is the question I have in terms of whether or not -- you  
14 are saying that investigation could go forward; but given the  
15 concerns that have been raised and the very vague nature of  
16 these claims, and if you saw in our supplemental affidavit and  
17 the documents presented, most of the December 20 allegations  
18 were demonstrably false. That's number one.

19 THE COURT: Let me respond to that before you move on.

20 The lawsuit that you brought is not a challenge to the  
21 disciplinary system of the New York City Department of  
22 Education. The lawsuit you brought alleges that the initiation  
23 of the OSI investigation was retaliatory and was done because  
24 your client sent an e-mail to her supervisor and to the  
25 overseer of the PSAL program, and I have ruled on whether you

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1 are entitled to a temporary restraining order and preliminary  
2 injunction with respect to those claims.

3 Now, if your argument now is that you think the DOE  
4 disciplinary process, to the extent it involves OSI  
5 investigations of this sort, to the extent you are arguing that  
6 there is something unlawful about the disciplinary process,  
7 that's a different claim. If you want to raise that claim, I  
8 suppose you can amend the complaint. But I'm not here today,  
9 nor does your lawsuit fairly implicate, the notion that there  
10 is something illegal about the entire investigative process  
11 under the OSI regime. If that's your argument and you think  
12 you have a claim on that point, you can amend your complaint to  
13 add it. It is not presently before me.

14 MS. MIRER: Well, it is to the extent that it raises  
15 the issue of D-130 being, in essence -- it being characterized  
16 beyond partisan politics, and that's where the concern is,  
17 because that is raised in the lawsuit as a result of the  
18 statements by the DOE as to the alleged legal basis for their  
19 claim as to why they are investigating her. And if it is based  
20 on D-130, then it seems to me that's where we have to be  
21 looking to determine whether any ideological belief can be the  
22 subject of an investigation.

23 THE COURT: I read D-130 to clearly prohibit DOE  
24 employees during working hours from soliciting students, for  
25 example, to join any particular political party or to engage in

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1 political activities, and I see D-130 as neutral. So whether a  
2 teacher were to solicit a student to participate, to join a  
3 march sponsored by the Democratic party or the Republican party  
4 or some other party, that would not be permissible. I don't  
5 see anything in D-130 that discriminates on the basis of  
6 political party or political committee. To me it seems  
7 neutral. Again, if you disagree, you can point that out to me,  
8 but the language reads neutral to me.

9 MS. MIRER: Your Honor, it is in our brief, and on the  
10 10th we will obviously raise these issues.

11 But the other question I have is, in the affidavit,  
12 initial affidavit presented by Ms. Guerra, there is a statement  
13 at paragraph 17 that on January 25, 2017, the SCI sent a letter  
14 with these additional allegations to both DOE and OSI. And  
15 while it doesn't identify who, we certainly know that OSI had  
16 knowledge as of January 25, 2017 of the complaints or the  
17 supplemental complaints.

18 THE COURT: I'm sorry. I am just trying to put my  
19 hand on the Guerra affidavit. Just give me a minute.

20 MS. MIRER: It is document 17.

21 THE COURT: You say paragraph 17?

22 MS. MIRER: Yes.

23 THE COURT: So paragraph 17 reads, and I quote, "On  
24 January 25, 2017, SCI sent the additional information it had  
25 received to DOE and OSI." I understand the additional



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1 information referenced to be the information received from the  
2 complainant, including the information obtained from the  
3 interview of the complainant. Now what's your point with  
4 respect to that?

5 MS. MIRER: The point is that Mr. Goldstein, who  
6 received the January 10 letter, is basically in the  
7 headquarters of DOE.

8 THE COURT: I understand that.

9 MS. MIRER: So I think that this point, the idea that  
10 we would have to pinpoint that the investigator would be the  
11 one that had knowledge, as opposed to others in OSI who would  
12 at this point have to make a determination whether to open an  
13 investigation, which they did on February 1, it just seems to  
14 me the temporal proximity between January 25 and February 1,  
15 when the DOE itself had the information about her complaint as  
16 to the PSAL and these allegations, and I believe I submitted to  
17 you three articles concerning this particular sensitivity, the  
18 sensitivity of Mr. Goldstein to allegations regarding race  
19 discrimination in the PSAL, and that to the extent you can  
20 assume that they don't talk to each other or that it is not  
21 circumstantial evidence that there was specific knowledge  
22 within the DOE --

23 THE COURT: Well, no, the issue is not whether there  
24 is knowledge in the DOE. That's kind of the flaw in your  
25 argument.

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1 MS. MIRER: Well --

2 THE COURT: The issue is whether the people at OSI at  
3 the time they decided to reopen the investigation on February  
4 1, 2017, had knowledge that your client had made a complaint on  
5 January 10, 2017; and, on that point, I have received evidence  
6 from the Department of Education, they say, no, and they have  
7 put in affidavits in support of that. And you haven't offered  
8 me anything. You haven't offered me evidence. You have  
9 offered me the time proximity. I addressed that. That gets  
10 you part way down the pike. But when your adversary puts in  
11 affidavits, we are no longer in a situation where, in my  
12 judgment, temporal proximity carries the day. At that point  
13 there has to be evidence that someone at OSI knew about your  
14 client's January 10, 2017 e-mail, and I don't have that  
15 evidence.

16 MS. MIRER: All I am saying, your Honor, is that an  
17 affidavit that says that the investigator didn't know doesn't  
18 address the issue of whether Eric Goldstein talked to the  
19 head --

20 THE COURT: Eric Goldstein doesn't work at OSI.

21 MS. MIRER: But OSI is a division of the DOE.

22 THE COURT: I understand, but the Department of  
23 Education is a very large institution. I don't know how many  
24 people are employed at the Department of Education. I would  
25 guess it is many thousands. And so to say that, well, Eric

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1 Goldstein works at DOE and he knew about it, so therefore OSI  
2 must have known about it, I am missing the connection. I don't  
3 see the connection.

4 MS. MIRER: Well, obviously discovery would have to --  
5 discovery in this case would have to suss out whether or not  
6 there is a --

7 THE COURT: And we are at a preliminary stage here.

8 MS. MIRER: Exactly.

9 THE COURT: There hasn't been discovery. And I have  
10 ruled on the basis of what I have before me. And if discovery  
11 shows something different, then you are welcome to come back  
12 and seek relief. But I have to operate on the basis of what's  
13 in front of me now. And based on what's in front of me now, I  
14 can't make a finding that anyone at OSI had any knowledge  
15 whatsoever about your client's January 10, 2017 e-mail.

16 MS. MIRER: Well, we certainly know that the people at  
17 DOE knew about the e-mail; and, to the extent there is a  
18 connection between DOE and --

19 THE COURT: We know Mr. Goldstein knew and we know  
20 that your client's direct supervisor knew. Other than that,  
21 I'm not sure who knew. But, more importantly, I don't have any  
22 evidence that anyone at OSI knew --

23 MS. MIRER: But we did --

24 THE COURT: -- and that's what matters for purposes of  
25 where we are today.

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1 MS. MIRER: Well, those are the points I wanted to  
2 raise.

3 I do think the court has misconstrued the issue with  
4 respect to *Matthews* as to the policy aspects of what *Matthews*  
5 was -- that the court really turned on whether or not -- the  
6 decision in *Matthews* was whether or not *Matthews* had -- it was  
7 part of his job to comment on the policy issue with respect to  
8 the issue of the quota, and I think we have submitted  
9 significant evidence that it was not, indeed, and it was  
10 extremely rare that anybody did stand up to address the policy,  
11 which is what she did in that January 10 e-mail.

12 THE COURT: Your client admitted in her affidavit that  
13 part of her job was to make sure that PSC got the sports teams  
14 it should get. This situation couldn't be more different from  
15 *Matthews*. *Matthews* was a patrol officer. He was a street cop.  
16 And he spoke to a supervisor about a policy issue. And in that  
17 context, the Second Circuit said it is not the responsibility  
18 of a street cop, a patrol officer, to be blabbing about policy  
19 to a captain at the NYPD.

20 Your client is a completely different category. She  
21 is the principal of a school. And she has said that part of  
22 her job was to make sure that her school got the sports teams  
23 that it fairly was entitled to. And so she sent an e-mail, an  
24 internal communication, to her supervisor and the overseer of  
25 the PSAL program and said, Hey, my school is not being fairly

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1 treated. I view that as part of her direct responsibility. I  
2 see the issue as very clear. Part of her job involved this.  
3 She admits that. I see the e-mail as being part and parcel, as  
4 the law says, of her direct responsibilities as the principal  
5 of the school.

6 MS. MIRER: Obviously we disagree in terms of whether  
7 or not it's part of her job to do anything more than request  
8 sports teams; and in terms of commenting on discrimination by a  
9 higher level, a different division, I don't think that's -- I  
10 don't necessarily see that relationship. However, you have  
11 ruled.

12 THE COURT: To the extent --

13 MS. MIRER: You have ruled --

14 THE COURT: Excuse me, ma'am.

15 MS. MIRER: Yes.

16 THE COURT: To the extent she points out the racial  
17 makeup of the high schools involved, I don't think that changes  
18 the nature of her e-mail which was, as I have said, a plea for  
19 additional sports teams for her school and the other schools  
20 located at John Jay complex. I don't believe that the  
21 reference to the racial makeup of the high schools changes the  
22 essential nature of her communication to her supervisor and to  
23 the head of the PSAL program.

24 MS. MIRER: She was asking not just for more teams,  
25 but combining the two, which was the issue in terms of

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1 segregation.

2 THE COURT: I understand that she was asking for the  
3 merger. That's the first line of the e-mail. I read it. But  
4 her argument for the merger was that the schools located at  
5 John Jay, at the John Jay complex, had far fewer teams and more  
6 students than the Millennium schools had with fewer students.  
7 That was her point. That's the point of her e-mail. We have  
8 nine sports teams, they have many more, and that's not fair.

9 MS. MIRER: It was actually separate but unequal.  
10 That was the point of the e-mail. That is definitely what was  
11 being raised by Mr. Garcia Rosen and --

12 THE COURT: I'm sorry? That was the point made by  
13 who?

14 MS. MIRER: The other administrator who had been taken  
15 out of his school and disciplined. We provided three  
16 affidavits -- three articles about that situation just within  
17 the previous few years. It really took a lot of -- it was very  
18 difficult for Ms. Bloomberg to be able to write that letter, to  
19 comment on this particular policy, which is something that is  
20 extremely sensitive to Mr. Goldstein, and maybe when we do the  
21 discovery we will find out --

22 THE COURT: I don't see that as a comment on policy.  
23 I saw it as a request for more sports teams.

24 MS. MIRER: Well, I'm -- this is the particular -- the  
25 way I read it was it was a statement about the policy of the

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1 DOE, PSAL not providing -- providing, in essence, the separate  
2 but unequal teams in that context.

3 THE COURT: All right. Well, let's look at the  
4 e-mail. You say that it is about policy. I say it is about  
5 teams. So let's look at it. And you can point out to me what  
6 is in it that you believe is about policy. I actually don't  
7 see the word "policy" in the e-mail. I don't see any reference  
8 to any other schools other than the John Jay schools and the  
9 Millennium schools. So show me where in the January 10 e-mail  
10 your client is talking about a Department of Education policy,  
11 because I don't see it. I see it as a very specific e-mail  
12 about her school and the other schools that make up the John  
13 Jay Campus versus the Millennium High School. That's what I  
14 see. I don't see any reference to any other schools. I don't  
15 see any reference to general policies. I don't know what you  
16 are talking about. But I am looking at the e-mail, and if you  
17 want to direct my attention to something, I am happy to look at  
18 it.

19 MS. MIRER: Your Honor, I don't have the e-mail. The  
20 policy she is requesting is to unite.

21 THE COURT: It's not a policy, ma'am. She is asking  
22 for action. "I'm writing to request your assistance in uniting  
23 the PSAL sports teams on the John Jay Campus in Brooklyn."  
24 That is a request for action. It is not a request for a policy  
25 change. It is a request for action. And she is very specific

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1 about the action she wants. And she is not talking about any  
2 other schools other than the schools of the John Jay Campus and  
3 the Millennium high schools.

4 MS. MIRER: I believe this is the only campus with  
5 separate teams.

6 Having said that, your Honor, I believe that this  
7 e-mail is fairly read -- is a statement with respect to the  
8 fact that they have been turned down for many teams. It is  
9 stating that there is a racial component to this. It is  
10 commenting on that racial component. And I do believe that,  
11 fairly read, this could be both a plea as well as a comment on  
12 the PSA policies with respect to allowing separate teams for a  
13 predominantly white school in Manhattan combined with a most  
14 majority white school in Brooklyn, using the same facility as  
15 three other schools. That --

16 THE COURT: How could it be a comment on a policy when  
17 you just said that as far as you know this is the only  
18 situation where there are separate teams at the same school?  
19 If that's true, and I don't know whether it is true or not, but  
20 that's what you just said, accepting it is true, then how could  
21 this be about a policy other than a specific situation?

22 MS. MIRER: Because we are talking about the issue of  
23 having separate but unequal allocation of resources to this  
24 campus where there are six schools involved. Now, obviously we  
25 read it differently. I read this as a comment with respect to



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1 the way in which the PSAL was racially segregating Millennium  
2 schools together and the other schools together. And that, to  
3 me, is a statement with respect to a disagreement with that  
4 approach and policy. Now, obviously, you know, she didn't use  
5 the words, the exact word of "policy," but I think a fair  
6 reading of this letter is in fact a criticism of a policy that  
7 allows this separation to continue.

8 THE COURT: It is a specific complaint about sports  
9 teams at two campuses, Millennium and John Jay. That's what it  
10 is about. It couldn't be more specific. We are told how many  
11 students are at each school, we are told what percentage at  
12 each school, what the racial makeup is. It couldn't be more  
13 specific. There is no suggestion in the e-mail this is some  
14 kind of comment on DOE's general policy. That is just not  
15 there. It is not there. It is a complaint about what's going  
16 on at John Jay. That's what it is about. And it is a request  
17 that it be fixed. You are correct that the request is that the  
18 teams be united, but the essential point is, We here at John  
19 Jay have nine sports teams and we have got 1859 students. Look  
20 at Millennium. They have 17, and they have only got 1261 kids.  
21 That's the point. The point is, there is an inequity that  
22 needs to be addressed. It's not a general comment on the DOE's  
23 policy about sports teams. I don't think that's a fair reading  
24 of the e-mail.

25 MS. MIRER: Well, there was a parent demonstration

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1 with a leaflet that's also attached which makes it very clear  
2 that this was about separate segregation and unequal, and  
3 that's a policy question for PSAL. It is not a strict resource  
4 issue.

5 Having said that, your Honor, you have ruled. I  
6 understand your ruling. I am just raising these concerns  
7 because, with respect to the *Matthews* case, I do think -- and  
8 with respect to whether she spoke as a citizen and in that  
9 context, I do think that the emphasis on official job duties  
10 versus whether it was part of her job to in fact make a comment  
11 with respect to the issues of segregation and so forth, I do  
12 think make it more closely related to the *Matthews* decision,  
13 and what I think is the focal point there of a person within a  
14 precinct raising a concern about the impact that a policy was  
15 having on the community and this quota system and it was a  
16 precinct -- it was only in the precinct that he was complaining  
17 about it.

18 So, having said that, your Honor, my concern is that  
19 there -- with respect to the analysis, we obviously have  
20 differences, and we will address those in some other fashion,  
21 but I do think that it was surprising that the court did not  
22 mention the fact that this particular issue of PSAL allocation  
23 of resource, which we did bring to the court's attention in our  
24 reply because we got this other information, about how there  
25 has been an historical raising of these kinds of concerns about

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1 PSAL's racial discrimination and allocation of teams, and that  
2 that putting it in that context, not to be able to see the  
3 knowledge of DOE of her complaint in that context, not raising  
4 some kind of specter --

5 THE COURT: You want to talk about DOE. It's not  
6 about DOE. I have explained to you it's not about DOE.  
7 It's --

8 MS. MIRER: I mean DOE relating to --

9 THE COURT: You have to show, you have got to give me  
10 some evidence that the folks at OSI who decided to reopen this  
11 investigation had some knowledge of her January 10, 2017  
12 e-mail. You haven't shown me that.

13 MS. MIRER: Here is my concern: My concern is that  
14 Goldstein gets the allegations and he goes to OSI -- I don't  
15 know this. I don't have it. But I don't think it is beyond  
16 belief that he is upset about this similar allegation. He goes  
17 with this information to OSI and they get their marching  
18 orders. That's all I am saying, your Honor. I don't think it  
19 is beyond circumstantially --

20 THE COURT: I understand that's your theory, and  
21 that's why we have discovery. You can take depositions here  
22 and you can put those questions to people, and you can find out  
23 what their answers are. In particular, you can ask  
24 Mr. Goldstein whether he spoke with anyone at OSI or directed  
25 anyone else to speak with OSI and to make sure that they

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1 reopened their investigation or did something negative towards  
2 your client. You have that right.

3 But as I said, I have to operate not on the basis of  
4 what might happen down the road or what a deposition might  
5 reveal that hasn't been taken yet, but rather based on what I  
6 have before me now. And the evidentiary record before me now  
7 includes affidavits from the defendants in which they say that  
8 the investigator at OSI who is involved in this had no  
9 knowledge of the January 10 e-mail, that the organization as a  
10 whole didn't know anything about it. That hasn't been  
11 contradicted with any evidence. So I have to operate on the  
12 basis of the evidence that is currently before me. Could that  
13 change? Absolutely. And if it did change, it might affect the  
14 availability of injunctive relief. But I have to operate on  
15 the basis of what I have now, and right now the record is  
16 unrebutted as to whether OSI knew. The evidence is they did  
17 not.

18 MS. MIRER: Okay, your Honor.

19 And then the last point is that I think we definitely  
20 will be raising the question of whether D-130 applies in the  
21 context of the question of ideological discussion as opposed to  
22 the issue of participation in electoral politics, which is  
23 clearly -- and partisan politics, which is clearly what OSI  
24 regulation D-130 goes to on its face.

25 THE COURT: All right. Well, I'm looking at D-130,

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1 and if you have a copy of it, we can look at it together.

2 MS. MIRER: Sure.

3 THE COURT: I am looking at D-130(I)(c)(1), and I  
4 quoted it, but I can quote it again: "While on duty or in  
5 contact with students, all school personnel shall maintain a  
6 posture of complete neutrality with respect to all candidates.  
7 Accordingly, while on duty or in contact with students, school  
8 personnel may not wear buttons, pins, articles of clothing, or  
9 any other items advocating a candidate, candidates, slate of  
10 candidates, or political organizations/committees."

11 Paragraph 2 reads, "personnel may not be involved in  
12 any activities, including fundraising, on behalf of any  
13 candidate, candidates, slate of candidates, or political  
14 organizations/committee during working hours." Now, to me,  
15 when it says "personnel," meaning DOE personnel, may not be  
16 involved in any activities on behalf of any political  
17 organization/committee during working hours, that seems very  
18 clear to me. I don't see ambiguity there.

19 MS. MIRER: The reference to committees, I believe,  
20 refers to committees supporting those candidates and  
21 organizations supporting those candidates, and that's what I  
22 referred to, which is in the introduction and it refers to --  
23 for some reason I am not seeing it, but I read it. In the  
24 title it says, "Use of School Buildings by Candidates, Elected  
25 Officials and Political Organizations and Conduct of School

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1 Employees and Officers with respect to Political Campaigns and  
2 Elections," but I believe there is a section where it says that  
3 the political organizations are the ones supporting those  
4 candidates.

5 Here it says -- that's number one -- "Use or access of  
6 school by elected officials, candidates for elected office, or  
7 organizations working on behalf of such officials or  
8 candidates," and that's in subparagraph 1 of the introduction.  
9 So the organizations they are referring to there are the ones  
10 that are working on behalf of officials or candidates.

11 THE COURT: All right. I told you how I read it. You  
12 read it differently, I guess. But to me I don't find it  
13 ambiguous. To me the clear import of what is stated in  
14 paragraph (I)(c)(2) is that DOE personnel are not supposed to  
15 be involved in activities on behalf of political organizations  
16 during working hours. That's how I read it.

17 MS. MIRER: It is organizations --

18 THE COURT: Let me ask you this: So is it your  
19 contention that DOE personnel are permitted to be involved in  
20 activities on behalf of political organizations during working  
21 hours? Is that your contention?

22 MS. MIRER: What I am saying is that there is no  
23 regulation with respect to what we might call ideological  
24 organizations.

25 THE COURT: I don't know what that means.

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1 MS. MIRER: Okay, well they are --

2 THE COURT: This says political organizations.

3 MS. MIRER: Well, the Progressive Labor Party is an  
4 ideological organization. It does not run candidates. It does  
5 not have a slate of candidates. It does not have organizations  
6 supporting those candidates. It does not have committees  
7 supporting those candidates. It is an organization that  
8 believes in certain ideas and espouses those ideas.

9 Now, what I am saying here, and that's why the  
10 analogy, the *Kramer* --

11 THE COURT: Let me stop you there. So you are telling  
12 me that the Progressive Labor Party is actually not a political  
13 organization? Is that what you are telling me?

14 MS. MIRER: It's not a political -- it's not a  
15 partisan political organization.

16 THE COURT: I don't know what that means. Let me go  
17 back. Is the Progressive Labor Party a political organization?  
18 Because I have to tell you, by its name, I would think it was a  
19 political organization. So if you are telling me it is not a  
20 political organization, I need to understand why it is not a  
21 political organization.

22 MS. MIRER: It might be a, quote, political  
23 organization, but it is not a partisan political organization,  
24 which is what D-130 is really confined to and which the cases  
25 that challenge that section of the D-130 said. They

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1 specifically said this is related to partisan politics.  
2 Partisan politics is typically Democrats, Republicans, maybe  
3 working families parties, ballot access parties which are in  
4 fact running candidates. The school isn't supposed to be  
5 showing -- pushing one candidate or another. And that's the  
6 overwhelming aspect of this. This is why we had meetings  
7 with -- we were having conversation with the New York Civil  
8 Liberties Union and general counsel to try to talk about the  
9 fact, and I think they admit that D-130 really goes to partisan  
10 politics, and the real question is, how do you get at the  
11 question of things not covered by D-130, which is potentially  
12 protected speech, advocacy, beliefs? Where do you draw the  
13 line? And that's what we raised the *Kramer* case for, because  
14 that's where the vagueness comes in. That's where we raise the  
15 *Muchmore* case. That's the vagueness issues. And if this is  
16 perceived to be a legal avenue for inquiry and the kind of  
17 open-ended investigation that OSI typically does, it seems to  
18 me that the court at least should narrowly tailor or at least  
19 address the question of narrowly tailoring this issue, and  
20 maybe we should come back on that question, because --

21 THE COURT: I think you would have to amend the  
22 complaint --

23 MS. MIRER: I will do that.

24 THE COURT: -- because it is not what your complaint  
25 is about now. Your complaint now is very clear. OSI reopened



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1 an investigation of your client as a result of her sending the  
2 January 10, 2017 e-mail. That's what your complaint is about.  
3 I have addressed your application for injunctive relief with  
4 respect to that. Now you are saying that there are problems  
5 with the regulatory scheme, and there is ambiguity in a  
6 Chancellor's regulation. That's --

7 MS. MIRER: No.

8 THE COURT: -- not before me at present.

9 MS. MIRER: Your Honor, when we filed the complaint,  
10 except for general statements in the letters that we got from  
11 the DOE attorneys, we had no idea what they are alleging  
12 specifically are the issues. We then get some allegations with  
13 respect to a movie, a foundation, a bake sale, and some vague  
14 allegation that students are afraid to talk and express their  
15 views.

16 THE COURT: But I don't understand what you just said  
17 because the complaint was filed on April 28. I read or  
18 summarized the entire correspondence between the parties here,  
19 and that included an April 6, 2017 letter in which it seems to  
20 me DOE was very clear about what your client was being  
21 investigated for, and I read that language into the record  
22 already. DOE said in the April 6 letter that the complaint  
23 they had received was that your client was a member of the  
24 Progressive Labor Party; that she had been actively recruiting  
25 students into that organization during school hours; that she

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1 had invited students to participate in that organization's  
2 activities, including marches. They laid all that out of in  
3 the April 6 letter. You didn't file the complaint until April  
4 28.

5 MS. MIRER: In part because we were in discussions  
6 with DOE general counsel and the New York Civil Liberties Union  
7 about this very issue of the question of what is it that is  
8 beyond -- that is being actually investigated here? That is  
9 not a specific claim, frankly, your Honor. I am just saying  
10 that generally she is a member of something and she is doing  
11 things, there is no who, what, where, why, and when. It is  
12 totally unspecific. And so we filed the case in part to find  
13 out what are the actual allegations, and what we got back was  
14 they didn't think there was enough evidence in May and the  
15 subsequent evidence that they provided refers to a movie, a  
16 permit.

17 These are the things that -- where is this going to  
18 go? Where is this investigation going to go? Are people going  
19 to be asked whether they believe in antiracism or  
20 antisegregation? I mean, that's the problem with an  
21 investigation that has no parameters and is looking at  
22 somebody's ideology and to see whether or not at any time Jill  
23 Bloomberg advocated in front of students that we should support  
24 integration. And if they say, well, that's the position of the  
25 Progressive Labor Party, therefore you must be doing -- this is

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1 the danger in this type of freewheeling investigation, your  
2 Honor, and we will amend the complaint to raise these issues  
3 because this is far beyond what D-130 is meant to regulate, far  
4 beyond. And it really gets into the kind of vague  
5 understanding of what is wrong and what is not wrong, and I'm  
6 sure the DOE could not tell you that what specifically would be  
7 a violation.

8 THE COURT: All right. Well, you will tell me by May  
9 10 how you wish to proceed. If that includes filing an amended  
10 complaint, you will tell me that, and you will ask permission  
11 for when you can file the amended complaint, and we will take  
12 it from there.

13 MS. MIRER: Thank you, your Honor.

14 THE COURT: Anything the city wants to say?

15 MS. O'CONNOR: No, your Honor.

16 THE COURT: All right. We are adjourned.

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